(2)

No. 06-99000 07-683 12-26-07

IN THE SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO,
Director, Arizona Department of Corrections, et al.,
Petitioners,

v.

GEORGE MOLINA LOPEZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

---

*Cary Sandman
WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.
5210 E. Williams Circle, Suite 800
Tucson, Arizona 85711
Telephone: (520) 790-5828

Kevin Clarence Lerch
LAW OFFICE OF KEVIN LERCH
3661 N. Campbell, #118
Tucson, AZ 85719
Telephone: (520)620-1900

*Counsel of Record

CAPITAL CASE

COUNTER STATEMENT OF QUESTIONS PRESENTED

During the state post-conviction proceedings, the trial court, after conducting an evidentiary hearing, addressed the merits of Respondent's claim that his lawyer was ineffective at the sentencing phase of the capital trial. The state supreme court denied this claim, among others, through a post-card denial. In habeas corpus proceedings, the district court, however, dismissed this claim on a procedural ground and therefore did not address it on the merits. Applying *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Picard v. Connor*, 404 U.S. 270 (1971), the court of appeals determined that in fact, the claim was exhausted in state court, and after taking a "quick look" at the merits of the claim, ascertained that Respondent sufficiently alleged the deprivation of a constitutional right. The court of appeals then remanded the matter to the district court for consideration of the claim's merits.

The scope and breadth of the ruling below is narrow and specific to the unique facts of Respondent's case.

1. Should the Court grant Certiorari to review a question of law, when the necessary factual premise for that question does not exist in the case at bar?

2. Is Certiorari appropriate to review a court of appeals' decision on issues that were not decided by that court?

BEST AVAILABLE COPY

TABLE OF CONTENTS

COUNTER STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED 7

THE COURT OF APPEALS' RULING WAS CORRECT 9

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *STRICKLAND* 11

THE REMAND TO THE DISTRICT COURT WILL NOT RESULT IN THE PRESENTATION OF EVIDENCE THAT WILL FUNDAMENTALLY ALTER THE CLAIM 12

CONCLUSION 14

TABLE OF AUTHORITIES

Atkins v. Virginia, 536 U.S. 304 (2002) 9

Baldwin v. Reese, 541 U.S. 27, 29 (2004) 10, 11

Gray v. Netherland, 518 U.S. 152 (1996) 10

Jefferson v. Welborn, 222 F.3d 286 (7th Cir. 2000) 8, 12

Morris v. Horn, 187 F.3d 333 (3rd Cir. 1999) 8, 12

O'Sullivan v. Boerckel, 526 U.S. 838 (1996) 10

Picard v. Connor, 404 U.S. 270 (1971) ..... i, 10

Rita v. United States, 127 S.Ct. 2456 (2007) 11

Slack v. McDaniel, 529 U.S. 473 (2000) ..... i, 6, 7

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 11

State v. Lopez, 174 Ariz.131, 847 P.2d 1078 (1992) 1, 5

Strickland v. Washington, 466 U.S. 668 (1984) 5, 8, 9, 10, 11, 12

Whitehead v. Johnson, 157 F.3d 384 (5th Cir. 1998) 8, 12

Wiggins v. Smith, 539 U.S. 510 (2003) 2, 3

Williams v. Taylor, 529 U.S. 362 (2000) 2

Ylst v. Nunnemaker, 501U.S. 797 (1991). 12

Vasquez v. Hillery, 474 U.S. 254 (1985) 13

STATUTES, RULES, REGULATIONS

U.S. Ct. R. 14 11

28 U.S.C. § 2254(d) 12

STATEMENT

In 1990, Respondent George Lopez was sentenced to death for the child abuse felony murder of his one year old son, Anthony. The relevant question is whether the federal district court should consider the merits of Lopez' *exhausted* claim, that his trial counsel rendered ineffective assistance, by failing to investigate and present key mitigating evidence at his capital sentencing. The court of appeals correctly ruled the district court should. Below, Lopez presents the facts and law relevant to the Court's consideration of the Petition.[1]

Finding that the aggravating circumstances outweighed the *proffered* mitigating evidence, the Arizona trial court sentenced Lopez to death. (ER 274.) The death sentence was narrowly affirmed by only a slim 3-2 margin, when two of the Arizona justices expressed grave doubts over whether the trial judge had actually considered a principal mitigating circumstance; Lopez' lack of intent to kill his son. Concluding they were unable to discharge their Eighth Amendment duty of independent appellate review on this record, the two justices refused to affirm the sentence. *State v. Lopez*, 174 Ariz.131, 145-146, 847 P.2d 1078, 1092-1093 (1992).

Following the narrow affirmance of his sentence, Lopez sought post-conviction relief from the Arizona trial court. The record shows that during the state post-conviction proceedings, Lopez exhausted the claim that he had been deprived of the effective assistance of counsel at sentencing, when his trial counsel failed to investigate and present reasonably available mitigating evidence.

Prior to his appointment to represent Lopez, trial counsel had never even tried a felony case to a jury. Needless to say, he had no capital case experience. (ER 359; 380-381.) During the

---

[1]Lopez adopts the facts and procedural history set forth in the court of appeals' decision, contained in Petitioner's Appendix B, at B-21-B-25.

Arizona post-conviction proceedings, counsel testified that he did not believe this was a case where the death penalty would ever be imposed. He believed the state lacked sufficient evidence to support a death sentence – a startling assumption – since, under Arizona's death penalty statute in A.R.S. § 13-703(F)(8), a murder of a child automatically renders an Arizona capital defendant eligible for the death penalty. (ER 360-362.) Trial counsel unreasonably discounted the risk that his client might be subject to punishment by death, and he prepared (or better stated, he failed to prepare) for the sentencing proceedings accordingly.

The evidence Lopez presented during the state post-conviction proceedings shows that trial counsel did not conduct an investigation comprised of efforts to discover all reasonably available mitigating evidence or evidence to rebut any aggravating evidence introduced by the prosecutor. (ER 368-371; 388; 403-419.) By definition, this describes a lawyer whose actions are objectively unreasonable and deficient. *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background); *Wiggins v. Smith*, 539 U.S. 510, 521-524 (2003). Lopez' trial counsel conducted no investigation targeted at discovering evidence of Lopez' life, or educational and medical history. (ER 368-370; 596(b)-596(d).) Had he done so, he would have learned about Lopez's deprived and nightmarish childhood. (ER 368-370; 596(b)-596(d).) As a result of counsel's deficient performance, he failed to present evidence: (i) that Lopez grew up in extreme poverty, living in a shack without electricity with alcoholic parents; (ii) that the family setting was rife with horrific emotional abuse and domestic violence; (iii) that Lopez lacked adequate clothing or food and went to school hungry; and (iv) that Lopez started drinking at age 12, and entered the eighth grade with a second grade reading level and failed to graduate from high school. (ER 405; 411; 596(b)-596(d).)

During the state post-conviction proceedings, the trial court authorized funding and expert assistance to help Lopez present his ineffective assistance claim. Lopez used that court funded assistance to retain Carla Ryan, a legal expert in death penalty sentencing. Not only did the state trial court appoint an expert to assist Lopez, the court also conducted evidentiary hearings to afford Lopez the opportunity to present his claim. Ms. Ryan testified at these state court evidentiary hearings. Ryan's testimony during the state post-conviction proceedings addressed counsel's deficient performance in several respects. She testified that effective performance in the penalty phase of a capital case requires that counsel conduct sufficient investigation and engage in sufficient preparation to be able to present and explain the significance of all available mitigating evidence, and that Lopez' trial counsel failed in those key tasks. (ER 404-419.) Ryan testified that counsel had a duty to thoroughly investigate Lopez' background and social history, but he never did. (ER 410-411.) Ryan also testified counsel had a duty to investigate Lopez' mental health, but he failed here as well, when he sent Lopez for a "general" mental status exam, without first providing critical available evidence of Lopez' family, medical and social history to Dr. Morris, the examining psychologist. (ER 413-414.) Ryan's testimony squarely defined the obligations that objectively reasonable counsel must fulfill in order to secure the accused's Sixth Amendment right to effective assistance of counsel. *Wiggins, supra.*

Ryan testified that as a result of the failures to perform the minimal duties owed to his client, that Lopez' trial counsel failed to discover and present important evidence to the examining psychologist and the sentencing judge, that Lopez grew up in a dysfunctional household with parents who were severe alcoholics. (ER 404-405.) As but one consequence to growing up with alcoholic parents, Ryan testified that Lopez started drinking at age 12, entered eighth grade with a second/third grade reading level, and never graduated high school. (ER 404-405; 411; 413.)

As part of the state court's consideration of the subject ineffective assistance claim, Lopez' trial counsel also testified during the post-conviction proceedings. His testimony focused squarely on his lack of preparation for the mitigation phase of Lopez' sentencing. Trial counsel's testimony showed that he failed to prepare for the sentencing, and had no tactical reasons for his inaction. (ER 360-362.) Asked what he did to prepare for the presentation of mitigation at sentencing, trial counsel conceded that all he did was to assign his associate the task of presenting some good character witnesses. (ER 376-379.) Counsel had no tactical reasons for failing to investigate readily available records pertinent to Lopez' disadvantaged background. (ER 368-370.) Counsel had no justification for sending Lopez to Dr. Morris without the fruits of a social history investigation; admitting to his deficient performance by acknowledging he sent Lopez to Morris without any direction at all. (ER 374-375.) In substance, the Arizona post-conviction record demonstrated that trial counsel abandoned Lopez to an inexperienced, unqualified associate told only to look for some good character witnesses, and did nothing to investigate or prepare to present reasonably available mitigating evidence concerning Lopez' tragic background and social history that supported a life sentence.

Counsel's unprofessional errors had serious consequences at Lopez' sentencing, where, despite counsel's deficient performance, significant mitigation evidence was before the trial court, rendering it all the more certain, that had the omitted evidence been presented at sentencing, there would have been a "reasonable probability" for a different outcome.

The trial court had received evidence at sentencing that Lopez had a long history of service to the community and to his country; he was predicted to be a force for good in the prison system, if granted a life without parole sentence; and what is more, that he did not intend to kill his son

Anthony.[2]

At the conclusion of the state post-conviction hearings, the trial court denied the ineffective assistance claim on its merits, under its ruling, entitled: "Claim That Mr. Bruner Failed to Investigate and Present Certain Mitigation." In its decision, the trial court purported to apply the test required by *Strickland v. Washington*, 466 U.S. 668 (1984), but examination of the decision readily demonstrates that the trial court unreasonably applied *Strickland*, and its decision was contrary to *Strickland* in several major respects. Among the several defects in the decision, the trial court made objectively unreasonable findings concerning the reasonableness of trial counsel's wholesale failure to investigate and present reasonably available mitigation, and it failed to apply the reasonable probability test for measuring prejudice, or weigh the totality of the mitigating evidence, as required by *Strickland*.

Following the post-conviction decision of the trial court, Lopez filed a petition for review with the Arizona Supreme Court. In his petition for review, citing, *Strickland*, Lopez asserted that his trial counsel had abandoned him during the mitigation phase of the sentencing proceedings. (ER 460-461.) Lopez described his counsel's abandonment of him during sentencing, stating counsel had "turned over the mitigation preparation" to an inexperienced junior lawyer in the law firm who lacked any relevant experience. Lopez further argued, as he has in these proceedings, that his lawyer

---

[2]Throughout the prosecution, the state never attempted to elicit proof, or even argue that Lopez intended to kill his son. Instead, at trial, the prosecutor argued to the jury that she did not need to prove Lopez intended to kill the child to obtain a felony murder conviction. (ER 83.) And during oral argument on direct appeal to the Arizona Supreme Court, the state conceded Lopez may well have acted without an intent to kill, and that lack of intent to kill would be a significant mitigating circumstance. The evidence showed Lopez loved his son, had employed CPR on Anthony to try and save his life, and then wept and grieved when he learned his son had died. (ER 11; 26; 37-38; 46, 342-343) And see *State v. Lopez, supra*, at 174 Ariz.145-146, 847 P.2d 1092-1093.

failed to prepare his mental health expert to present mitigation: "[he] gave no direction to Dr. Morris as to the evaluation" and never "asked for anything specific to help the case . . . [he] believed the death penalty would not be imposed and prepared accordingly," abandoning Lopez during the sentencing phase. (ER 464.) The Arizona Supreme Court issued a postcard denial of the Lopez petition.

At the conclusion of the state post-conviction proceedings, Lopez filed the subject habeas proceedings in the federal district court of Arizona. In his habeas petition, Lopez claimed that his trial counsel had rendered ineffective assistance by failing to investigate and present all relevant mitigating evidence at sentencing, including evidence bearing on Lopez' social history and background. Lopez offered evidence to the district court (just as he had in the state court post-conviction proceedings) that the sentencing judge was deprived of information that Lopez grew up in a dysfunctional household with alcoholic parents, that Lopez began drinking as a child at an early age, and that defense counsel failed to provide the examining psychologist any facts about Lopez' family or social history. This was the same evidence presented in the state court proceedings. But the district dismissed the ineffective counsel claim, erroneously concluding it had not been exhausted, and thus the claim was not reviewed on its merits in the district court proceedings.

Following the district court's decision denying Lopez' claims, that court entered a *sua sponte* ruling (without affording Lopez an opportunity to be heard) refusing to certify the appealability of all but one of Lopez' claims. Therefore, neither Lopez' substantive claim, that his counsel failed to investigate and present reasonably available mitigation, nor the underlying district court dismissal of the claim for lack of exhaustion, were certified for the appeal. Reliant on *Slack v. McDaniel*, 529 U.S. 473 (2000), Lopez asked the court of appeals for a certificate of appealability (COA) on the ineffective assistance of counsel claim and the claim's underlying procedural dismissal.

Applying *Slack*, the court of appeals granted the COA. (See *Lopez v. Schriro*, in Petitioner's Appendix B at B-21 through B-25). The court of appeals then concluded that Lopez had exhausted this ineffective sentencing counsel claim during the Arizona post-conviction proceedings, and after determining the facial validity of the claim, it remanded the case to the district court, where the substance of the federal claim could be considered on its merits. *Id.*

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The Petition for Writ of Certiorari should be denied because this case does not implicate the questions presented and therefore cannot resolve those questions. The first question posed in the Petition presents as a fact, that the court of appeals determined that "Lopez had properly exhausted all of his ineffective assistance of counsel claims." The court of appeals' decision is premised on a much more narrow holding, not the one posed by Petitioner. The court of appeals decided only that Lopez exhausted the claim that his counsel rendered ineffective assistance by failing to present available relevant mitigating information at sentencing. (Petitioner's Appendix B at B-21 through B-25.) This is the identical claim Lopez presented in the state court proceedings; upon which the Arizona trial court issued a substantive, merits-based decision under the subject heading entitled: Claim That Mr. Bruner Failed to Investigate and Present Certain Mitigation. Contrary to the facts set forth in the Petitioner's presented question, the court of appeals never held that Lopez had properly exhausted all of his ineffective assistance of counsel claims. This case is not a proper vehicle to review a holding never entered by the court of appeals.

Second, the Petition is also inaccurate when it argues that the court of appeals held that Lopez' exhausted federal claim should be expanded to cover areas of the ineffective assistance claim not presented in the state court proceedings. The court of appeals made no holding regarding

expansion of Lopez' claim. What the court of appeals did hold (after finding the claim exhausted and facially valid) was that any issue with respect to expansion of the record on this claim would be remanded to the district court. It stated: ". . . on remand the district court will therefore need to determine whether Lopez, who received a hearing in state court, is entitled to supplement the record . . .." (Petitioner's Appendix B at B-25, n.8.)

The decision to remand the exhausted facially valid claim to the district court for its review was entirely proper, violated no principle of law of this Court, and follows a procedure routinely applied in the federal courts of appeal. See *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000) (remanding determination of merits of federal claim to district court, after COA has been granted and district court's dismissal of claim on procedural ground has been reversed); *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998) (once court of appeals concludes that the district court erred in dismissing an application because of failure to exhaust, it should vacate and remand to the district court to address the merits of the habeas claims in the first instance); *Morris v. Horn*, 187 F.3d 333, 341 (3rd Cir. 1999) (once court of appeals concludes that district court's decision on procedural issue which led to dismissal of federal habeas corpus petition was erroneous, it should remand if the district court had not considered the merits of the constitutional claims).

The second question presented in the Petition is not supported by the facts and record either. It posits that the court of appeals improperly rejected a district court decision that Lopez did not establish his ineffective assistance claim under *Strickland*. This question mischaracterizes both the holding in the court of appeals, as well as the decisions made in the district court proceedings. The court of appeals decision did not reject a district court finding, that Lopez failed to establish his federal claim under *Strickland*. (Petitioner's Appendix B at B-21 through B-24.) Instead, the court

of appeals correctly determined that the district court had not considered the merits of this federal claim, and the claim was remanded to the district court for its first consideration. While the district court did reject other wholly unrelated ineffective assistance of counsel claims, it did not decide the merits of the subject claim because it had dismissed it for lack of exhaustion.

The Petition is inaccurate in one more way as to the second presented question. In apparent support of its improperly posed second question, the Petition cites to a wholly inapposite district court decision, where that court dismissed an *Atkins v. Virginia*, 536 U.S. 304 (2002) claim, that Lopez presented in a motion to amend his habeas petition. (See Petition for Certiorari at pp. 14-15.) The district court's decision refusing to allow Lopez to add the *Atkins* claim was not the subject of Lopez' briefs on appeal, or the court of appeals' decision, and it has no bearing on the ineffective assistance claim here, or its related exhaustion issue. The district court's ruling on this wholly unrelated claim is not relevant to any of the presented questions.

THE COURT OF APPEALS' RULING WAS CORRECT

As outlined above, within the state court post-conviction proceedings, Lopez presented the claim that his trial counsel had failed to investigate and present available mitigating evidence at sentencing. The record demonstrates that counsel failed to conduct a thorough investigation of Lopez' background, that he virtually abandoned Lopez during the mitigation phase of the proceedings, and that reasonably available mitigating evidence was never presented to the sentencer. The state court helped Lopez present the subject claim by providing him with funds for an expert witness and by conducting evidentiary hearings concerning the claim. Following hearings, the state court decided this claim under the heading: "Claim That Mr. Bruner Failed to Investigate and Present Certain Mitigation." Lopez then exhausted his claim to the Arizona Supreme Court in a

petition for review, where he identified *Strickland* as the controlling federal authority, and he alerted that court, that his constitutional rights to the effective assistance of counsel in presenting mitigation at sentencing were violated when his lawyer did nothing to investigate and present mitigating evidence. The record shows Lopez plainly provided "the State the opportunity to pass upon and correct alleged violations of [his] federal rights" and he fairly presented the claim. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). Petitioner has failed to cite to a decision of this Court which dictates a result different than reached by the court of appeals.

Thus, the court of appeals' decision threatens none of this Court's longstanding exhaustion jurisprudence, and each of the decisions cited by the Petitioner are inapposite. The Petitioner's citation to *Picard v. Connor*, 404 U.S. 270 (1971) is not helpful. There, the court held that an equal protection claim had not been exhausted, because it had not been presented in the state court proceedings, and the defendant's due process arguments in the state court proceedings were not sufficient to exhaust an equal protection claim. Here, Lopez did present his federal claim in the state court proceedings and the state court decided that claim squarely on its merits. Petitioner also relies on *Gray v. Netherland*, 518 U.S. 152 (1996) where this Court was presented with a federal claim premised on facts which had never been presented in any state court. Here, Lopez presented facts in the state proceedings that mirror the facts presented in the federal proceedings, and the state court addressed the merits of the claim it its final decision.

The Petition also relies on *O'Sullivan v. Boerckel*, 526 U.S. 838 (1996), where the court determined a federal claim had not been exhausted because the defendant had failed to file an application for discretionary review with the state's appellate court. Here, Lopez expressly requested the Arizona Supreme Court review his federal claim. Finally, Petitioner cites *Baldwin v. Reese*, 541

U.S. 27 (2004), where the court found that a federal claim had not been exhausted in its presentation to the Oregon Supreme Court, by its inclusion in a lower court opinion. Again here, unlike *Baldwin*, Lopez did include his federal claim within his Arizona Supreme Court petition.

The court of appeals' exhaustion ruling is not contrary to any of the cases cited in the Petition for Certiorari, or this Court's jurisprudence. The court of appeals decision is reasonably considered, it is supported by the undisputed facts in the record, and was correctly decided.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *STRICKLAND*

The Petitioner argues alternatively, that if Lopez' federal claim has been exhausted, then the exhausted claim should be dismissed because the court of appeals failed to defer to a reasoned state court decision. This argument should be rejected for several reasons. First, the argument was not presented below, and under this Court's rules it is not properly raised now for the first time. U.S. Ct. R. 14 (requiring a petitioner to show that a federal question was timely and properly raised in the proceedings below); *Rita v. United States*, 127 S.Ct. 2456, 2470 (2007) (declining to consider an issue not raised below); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (finding an issue waived when not raised below).

Not only did the Petitioner fail to raise the issue below, but even now in its Petition for Writ of Certiorari, the Petitioner provides no factual or legal support for its argument that the state court made a reasoned decision to which the Lopez claim must defer; it simply states this, inadequately, as a bald-faced conclusion.

Just as important, in addition to not being raised by the Petitioner below, the issue was not decided by the court of appeals. The court of appeals did not undertake to determine the merits of

the federal claim. The court of appeals only determined that Lopez had "sufficiently alleged the deprivation of a constitutional right," and then it remanded to the district court the task of deciding the merits of the claim. (Petitioner's Appendix B-24.) This Court's intervention, to decide the merits of a claim that has yet to be fully presented or decided by any lower federal court is not warranted.

What is more, although the Petitioner failed to raise any issue or argument with respect to the merits of the claim below, Lopez did present substantial evidence and law to the court of appeals, which demonstrated that under 28 U.S.C. § 2254(d), the last reasoned decision of the state court was contrary to and unreasonably applied *Strickland* in several key respects.[3] All that the court of appeals decided based on Lopez' § 2254(d) showing was that he had made a sufficient demonstration to warrant an initial determination of the claim on its merits. Under these circumstances, the courts of appeal have uniformly agreed that remand to the district court is proper. *Jefferson v. Welborn*, *supra*, 222 F.3d at 289; *Whitehead v. Johnson*, *supra*, at 157 F.3d 388, *Morris v. Horn*, *supra*, at 187 F.3d 341. The remand to the district court was especially proper here, given the fact that Petitioner had elected not to argue the merits of the claim in its briefing to the court of appeals.

THE REMAND TO THE DISTRICT COURT WILL NOT RESULT IN THE PRESENTATION OF EVIDENCE THAT WILL FUNDAMENTALLY ALTER THE CLAIM

Finally, Petitioner argues that Lopez' claim hinges on new information that was not presented in the state court. (Petition at 13.) Petitioner also expresses some vexation over a footnote in the

---

[3]When considering potential state court error, this Court looks to the "last reasoned decision of the state court as the basis of the state court's judgment." *Ylst v. Nunnemaker*, 501U.S. 797, 803-804 (1991). Here, the last reasoned decision was made by the trial court.

court of appeals' opinion deferring to the district court any decision concerning whether Lopez will be permitted to supplement the state court record. As an initial matter, these arguments were not raised below, they are not fairly included within the questions before this Court, and they are not appropriately raised here for the first time. However, beyond this, the argument is without merit. Remand will not result in presentation of evidence that will fundamentally alter the claim.

As explained above, the primary facts supporting Lopez' claim are already contained in the state court record, and those facts will be relied upon when the case is finally remanded for the further district court proceedings. (See pp. 1-5 above.) Upon remand, the district court will decide in it's discretion whether Lopez may supplement the record. *See Vasquez v. Hillery*, 474 U.S. 254 (1985).

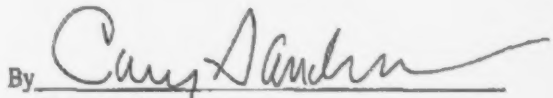
The court of appeals footnote concerning the possibility of Lopez presenting supplemental evidence addresses a statement made in Lopez' opening brief in the court of appeals, where he candidly disclosed that "Lopez' presentation in the federal [district] court expanded somewhat on the level of dysfunction and poverty in the household, but the evidence presented in the federal proceedings did not significantly alter, or have the effect of not exhausting the claims." (Lopez' Opening Brief at p. 67.) The court of appeals properly determined not to decide the admissibility of the additional evidence, remanding the question to the district court, where the merits of the claim will be determined in the first instance. The court of appeals correctly decided that the district court should serve as the appropriate gatekeeper of evidence Lopez offers to support the merits of the claim.

CONCLUSION

The court of appeals correctly decided the exhaustion issue on a unique set of facts and properly remanded Lopez' ineffective assistance of counsel claim to the district court for its determination on the merits. The Court should deny Petitioner's request for a Writ of Certiorari.

Dated this 24th day of December, 2008.

WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.

By 
*Cary Sandman
Attorneys for Respondent

Kevin Clarence Lerch
LAW OFFICE OF KEVIN LERCH
3661 N. Campbell, #118
Tucson, AZ 85719

*Counsel of Record